SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 172.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY, APPELLANTS,

v.

ALRA G. FARRELL, APPELLEE.

REPLY BRIEF FOR APPELLANTS.

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1. A considerable part of the brief for appellee is devoted to an argument that a description in terms of future survey can never be valid, under any circumstances or conditions. But, of course (as counsel conceded on oral argument), this question is foreclosed by the decision of this court in the West case (244 U. S., 90) and by the decisions of the court of appeals, the district court, and the Department cited in our original brief.

2. It is stoutly asserted in appellee's brief that "no such

practice ever existed"—*i. e.*, the practice of allowing or requiring selections of unsurveyed land to be made in terms of future survey. And a great part of the argument for appellee is based upon that assertion. Sufficient refutation is found in the Department's decisions in Hanson *v.* Northern Pacific, 38 L. D., 491, and Daniels *v.* Northern Pacific, 43 L. D., 381. But we need not rest there, for the records of the Land Department show that prior to the selection here involved (which was made July 23, 1901), hundreds of selections by the railway company under the act of March 2, 1899, of unsurveyed lands, aggregating many thousands of acres, had been received and allowed and subsequently passed to patent, and that in those cases the form of description was identical with the form here attacked. If further evidence that this then was the recognized practice is wanted, it will be found in Northern Pacific *v.* Pyle, 31 L. D., 396, decided July 31, 1902, although the sufficiency of such a description was not there questioned or doubted.

3. It is doubtless true that the first reported decision of the Department in which the sufficiency of this form of description, as applied to selections under the act of 1899, was directly sustained and upheld is Hanson *v.* Northern Pacific, 38 L. D., 491, decided March 16, 1910. But that was merely because its sufficiency had not theretofore been challenged. See Daniels *v.* Northern Pacific, 43 L. D., 381. The practice of describing unsurveyed lands in this manner had been uniform from the beginning; no other form had been used; such selections had been sustained in scores of cases in which other questions were litigated; selections covering many thou-

sands of acres of unsurveyed land so described had been approved and passed to patent, and the sufficiency of such description had never been doubted or questioned.

And it is settled law that rules or methods of procedure, fixed or sanctioned by usage or practice in the Land Department, have the same force and effect, and afford the same protection to parties complying with them, as rules or methods established by express regulation, "circular" or instructions, or by formal published decisions. See authorities cited on pages 27-38 of our original brief.

4. In one case only was doubt as to the sufficiency of a description in terms of future survey ever expressed. That was the case of F. A. Hyde *et al.*, 40 L. D., 284. The letter of Assistant Secretary Adams, referred to on pages 33-35 and 61-62 of appellee's brief, was merely a more or less informal inter-departmental communication in which the Assistant Secretary undertook to explain and defend his opinion in the Hyde case against criticism within the Department. The doctrine of the Hyde case was never recognized, followed, or applied by the Department, and the case was soon afterwards expressly overruled and repudiated (Daniels *v.* Northern Pacific, 43 L. D., 381). Furthermore, it is flatly in conflict with the decision of this court in the West case (244 U. S., 90).

But in the aspect of the case at bar, in which counsel for appellee invoke the Hyde case, it is interesting to note that the Hyde case did not deal with selections under the act of March 2, 1899, with which we are here concerned, but with selections under the act of June 4, 1897. And it is not dis-

puted that specific regulations, applicable to selections under the latter act, were promulgated in May, 1899, which expressly provided that "Every selection of unsurveyed land must designate the same by the description by which it will be known when surveyed." Counsel for appellee here rely upon the contention that there was no specific formal regulation applicable to selections under the act of March 2, 1899. And as sole authority for their position they invoke an overruled decision of the Department dealing with selections made in conformity to specific regulations applicable to the act under which those particular selections were made.

3. Counsel insist that in each of the three several decisions in which the claim of their client to the land here in suit was considered by the Secretary of the Interior—on the original hearing, on petition for rehearing, and on petition to the supervisory power of the Secretary—the case was disposed of without consideration of the *facts;* so that the decision was of a question of law merely, and did not involve the determination of a question of fact, or even a question of mixed law and fact. And the sole basis for this assertion is that in two of those decisions reference is made to the case of Daniels *v.* Northern Pacific, 43 L. D., 388[1], as authority.

But in the Daniels case it was held that the form of description there and here challenged was sufficient to satisfy the statutory requirement of "a reasonable degree of certainty," because it could be tied in to a surveyed line already established in the vicinity. And in the case at bar (as the records of the Department show, and appellee's brief declares) the papers and briefs upon which the Department rendered the decisions complained of explicitly set forth and put great

emphasis upon the fact that *this* land was further from the nearest established survey line than was the Daniels land, and was in a rough country, etc., and urge that "under the clear and unmistakable language of the decision in the Daniels case" the description *of this* land in terms of future survey must be held uncertain and insufficient. It was in response to this argument that the Department said: "The description employed in this particular selection, under the decision in Daniels *v.* Northern Pacific, complied with the statute, as it was made with a reasonable degree of certainty."

How is it possible to construe this otherwise than as a holding that under the reasoning of the Daniels case to the effect that a description in terms of future survey is at least good where it can reasonably be tied in with established surveyed lines, when applied to the particular facts of this case, the description was sufficiently definite and certain to satisfy the statute? And what is that but the determination of a question of fact, or of mixed law and fact? For the question of law involved is no longer debatable. The reasoning of the Daniels case was adopted by the District Court and the Court of Appeals in the West case, and was accepted by this court in that case as sufficient to dispose of the question.

We think it affirmatively appears from the language of these decisions of the Department that the question was duly considered and determined, as a question of fact. And, of course, the decision of the Department of a question of fact, or of mixed law and fact, cannot be reviewed by the court. But it is at all events plain that these decisions are at least open to that inference, and that a contrary inference—such

as that which appellee's counsel contend for—would be strained and unreasonable. Furthermore, such an inference would flatly conflict with the presumption which must be indulged in support of the patent title—the presumption that the officers of the Land Department performed their duty to consider and determine the essential questions presented by the record and evidence before them. We beg leave to call attention to what is said on this general subject on pages 13-24 of our original brief.

6. Counsel misconceive our position as to the point dealt with at pages 27-39 of our original brief. We do not assert that where the question is one of *substantive law*—as, for instance, whether the land is subject to the particular form of appropriation, or whether the claimant is of the class entitled to take such land, or the like—the departmental construction of a statute is binding upon the Department itself or upon the courts. But we *do* assert that where the question is one of *practice and procedure merely*, and where the claimant has, in compliance with the rulings and instructions of the Department, taken the particular steps required by departmental regulations, in the manner prescribed by the Department under its administrative construction of the act, he is protected thereby and is not to be deprived of his rights upon the ground that such construction was ill-advised and that a different mode of procedure should have been prescribed. This is upon the principle that a claimant, who is by the statute entitled to take the particular land, should not be penalized for his obedience to the rules of *procedure* laid down by the officers of the Government to whom the

administration of the law is confided, and in whom is vested the authority and duty to construe the statute and prescribe rules and methods of procedure thereunder.

> "Until a rule is changed it has all the force and effect of law, and acts done under it while it is in force must be regarded as legal."

See authorities cited on pages 29-38 of our original brief.

Perhaps we may be excused for repeating here that the question now before this court is not one having to do with substantive rights under the statute. It is not a question of who can take under the act, or of what land may be taken, or of the extent or character of the appropriation. It is merely a question of *procedure*—of what steps should have been taken in order to perfect the right granted. The Department, construing the statute, pointed out the steps to be taken. The railway company followed the line thus marked out, faithfully and with exactness. The rights of the timber company were acquired on the faith of the regularity of the railway company's procedure, in the light of the departmental sanction given it. No one was misled or prejudiced by the fact that the railway company pursued the approved practice instead of adopting a different method. The railway company could just as well and just as easily have taken another course—have employed a different form of description—and it would have done so if the Department had so directed. And it cannot be pretended that appellee's position would have been improved if the Department *had* construed the act differently and required a different form of description.

7. On pages 56-57 of appellee's brief, counsel cite and quote at length from the opinion of the Supreme Court of Washington in Bird Timber Co. *v.* Snohomish County, 81 Wash., 416; 143 Pac., 433. The same matter appeared in the brief filed in this court by the same counsel in the West case, and is again pressed on the attention of this court, notwithstanding it was pointed out in our brief in the West case that upon rehearing the Washington court *expressly withdrew* all it had said on the subject in its former opinion. Bird Timber Co. *v.* Snohomish County, 88 Wash., 90; 152 Pac., 689.

8. Counsel says that the act of March 2, 1899, is "unique;" that "no other statute requiring the same construction has ever been passed by Congress for the disposal of the public lands, and none ever gave the grantee such special privileges." Yet in the very particulars in which counsel terms the act of 1899 "unique" it is an almost, if not quite, literally exact copy of the act of August 5, 1892 (27 Stat. L., 390), which has frequently been passed upon by the Department and has been before this court for construction in at least two cases.

Nor is it true, as asserted in appellee's brief, that the act of 1899 has been held to be a "private" act. Certainly it was not so held in Comstock *v.* Northern Pacific, 34 L. D., 88, cited to that effect, nor in any other case we know of.

9. The inaccuracies mentioned in the preceding subdivision are probably neither material nor important. But the statement is repeatedly made in appellee's brief that the regulation of May 9, 1899, prescribing the manner in which

unsurveyed land should be described—that is, "by the description by which it will be known when surveyed"—was *"specifically revoked"* by circular of December 18, 1899 (29 L. D., 391). Upon this statement is built an argument that the provisions respecting the description of unsurveyed land were not in force after December, 1899, and consequently not in force when the selection here involved was made, in July, 1901. And this statement may be material, and is certainly specious and misleading.

For while the regulation of May, 1899, was amended in December, 1899, and the circular promulgating the amendment was ordered "substituted" for the May circular, the amendment so made had no relation whatever to the matter of *description*, and the December circular contained precisely the same provisions as to description as the May circular—copied verbatim from it.

10. The issue involving the effect of the application for survey made in behalf of the State of Idaho is so well covered by the thorough and scholarly opinion of the district judge (Transcript of Record, pp. 136-146; Appellants' Brief, pp. 50-56) and by the authorities cited in our original brief, that there is little which need be added in the way of reply. There are a number of inaccurate statements in that part of appellee's brief which is devoted to this issue, but only a few of them seem to require specific notice.

11. The case of Northern Pacific *v.* State of Idaho, 39 L. D., 583, so heavily relied on by counsel for appellee, is one of those cases which was overruled—"recalled and vacated"—in Thorpe *v.* State of Idaho, 43 L. D., 168. We re-

peat that this is the only case in which it was ever held that an application for survey, even where valid and effective (as in Thorpe *v.* State of Idaho, *supra*, this application was held *not* to be), operated to prevent the attaching of subsequent claims, subject to the preference right of the State. And in this aspect the decision in 39 L. D., 583, was directly in conflict with the decisions, both earlier and later, cited at pages 65-70 of our original brief. The unreported decision of Carrie E. Shearer *v.* Northern Pacific, referred to on page 73 of appellee's brief, was merely an interlocutory decision by the *Commissioner* under the instructions given by the Secretary in the opinion in 39 L. D., 583.

In passing, let us correct the impression under which counsel seems to labor, that the land here in suit was involved in the decision in 39 L. D., 583. It was not. Nor is it true, as counsel says, that the railway company's selection here involved was "three times"—or ever—canceled by the Department.

12. Counsel fails to grasp the distinction, with respect to segregative effect, between a blanket application for survey under the act of 1894 and an entry or selection of particular land, duly accepted and allowed by the local land officers and remaining intact of record. This distinction is clearly pointed out in the opinion of the district judge (Transcript, pp. 143-144) and in the authorities cited in our original brief (pp. 77-78), to which we beg to direct the attention of the court.

The cases cited by counsel for appellee on this point—notably those found at pages 74-75 and 88-90—illustrate this error. They are all cases dealing with a specific, affirma-

tive claim attaching to a particular tract of land. McIntyre *v.* Roeschlaub, cited at page 74 and again at page 89 of their brief, is a conspicuous example.

13. The aspect of this case which presents the question whether, if the application for survey had been valid and effective and had taken effect before the railway company's selection list was filed, that selection would thereby be rendered invalid as against the *subsequent* settlement claim which appellee sets up (the State having failed to select), was before this court in United States *ex rel.* Hall *v.* Payne, Secretary, No. 95 of this term, decided December 18, 1920. And while that was a mandamus case, and hence did not require a definite and final construction of the act of 1894, the decision rendered sustains our position so far as it goes. In the opinion it is said:

> "The direction of the act that the lands be reserved 'from any *adverse* appropriation' means necessarily an appropriation adverse to the State, and this gives color to the Secretary's view." (Italics by the Court.)

This proposition alone, if adhered to, is sufficient to dispose of the question. And at all events the decision in the Hall case conclusively disposes of the argument that the application for survey operated to withdraw the land from the jurisdiction of the Department.

14. There are many statements in the brief for appellee which are quite outside the record—not merely outside the record in this case, but outside the records of the Department

as well. And there are others which are obviously immaterial. We have not deemed it necessary to notice such statements in this brief; but our failure to do so should not be considered as an admission of their accuracy.

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